IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.2626 OF 2005

IN

SUIT NO.2441 OF 2005

1. Mr.Ashok K.Shah & another. ...Plaintiffs

vs.

1.Suresh Bhailal Patel & ors. ...Defendants

Mr.D.D.Madan i/b. J.S.Kini, for Plaintiffs.

Mr.B.B.Saraf i/b. Ranjit Dharmadhikari, for defendant nos.2 and 3.

Mr.S.R.Saudagar, for Defendant nos.4 to 7.

CORAM: D.K.DESHMUKH,J.

DATED: 16th April,2007

P.C.:-

1. This is a notice of motion taken out by the plaintiffs. The plaintiffs have filed this suit for a decree of declaration that the plaintiff no.1 is

entitled to a stilt car parking space no.2 situated at Plot no.58 J.V.P.D. Scheme, 12th North South Road, Juhu, Vile Parle (West), Mumbai and that the plaintiff no.2 is entitled to open car parking space no.18 on the same plot. The case of the plaintiffs is based on the agreement entered into between he plaintiffs and the defendant no.1 who is a builder. To that agreement even defendant no.2 who is the land owner is also a party. Perusal of that agreement shows that so far as the plaintiff no.1 is concerned he has been given two open car parking spaces i.e. car parking space nos. 17 and 18. By the same agreement the second plaintiff is given car parking space no.19 and 20 and one stilt car parking space at no.2 All the defendants have been served. So far as defendant no.1 is concerned, he is not appearing. The defendant nos. 2 and 3 are appearing but they have not filed any reply. So far as the defendant nos. 4, 5, 6 and 7 are concerned, they tried to tender their reply when the notice of motion was called for hearing, though they have been served with the notice of motion long bank and the affidavit in reply which they have tried to tender is sworn in January,2006. The learned Counsel appearing for defendant nos. 4 to 7 is not in a position to give

any explanation for not servicing copy of the affidavit from January,2006 till today except saying sorry for not serving copy of the reply on the plaintiffs for more than a year. In my opinion, the tendency of keeping reply with himself though it was sworn long back and not giving copy thereof to the other side and now trying to tender it in the Court and trying to give copy to the plaintiffs when the matter is called for hearing, require to be discouraged because it is found that such tactic is adopted by the litigants as a strategy for getting matters adjourned. Therefore, I declined permission to defendant nos.4 to 7 to place their reply on record However, I have heard the learned Counsel appearing for defendant nos. 4 to 7. According to him, in the agreement that was entered into between the builder and defendant nos.4 to 7 the car parking space no.18 and the stilt car parking space no.2 was given by the defendant no.1 to them. But even, according to the learned Advocate, the agreement executed by the builder in their favour is of March,2003, and the agreement between the plaintiffs and the land owner-defendant no.1 & 2 is of September,2002. Thus, by prior agreement the defendant nos. 1 had allotted car parking space no.19

and stilt car parking space no.2 to the plaintiffs and therefore, the defendant nos. 4 to 7 prima facie will not get any right to those car parking spaces. The learned Counsel appearing for defendant nos. 2 and 3 submits that though by agreement between the parties those car parking spaces have been allotted to the plaintiffs, subsequently there was oral understanding reached between the parties that the plaintiffs would not be entitled to those car parking spaces. Thus, the defence of the defendant nos. 2 and 3 who have not filed any affidavit in reply is based on the alleged oral understanding. Obviously, therefore, they will have to prove that oral understanding by leading oral evidence in the suit.

2. So far as the notice of motion is concerned, at this stage the Court will have to go by the written document placed on record. If one peruses the agreement between the plaintiff, defendant no.1 and defendant no.2, it is clear that the plaintiffs have been allotted car parking space no.18 and stilt car parking space no.2 and therefore, the plaintiffs are entitled to interim relief so that their interest would be protected.

3. The notice of motion is therefore, granted in terms of prayer clause (a) and (b). Notice of motion is disposed of.